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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

In re J.A., a Person Coming Under the Juvenile
Court Law.

THE PEOPLE,

Plaintiff and Respondent,

v.

J.A.,

Defendant and Appellant.

F077750

(Super. Ct. No. JW137896-00)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Kern County. William D. Palmer, Judge. (Retired Judge of the Kern Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.)

Linda K. Harvie, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Catherine Chatman and Harry Joseph Colombo, Deputy Attorneys General, for Plaintiff and Respondent.

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* Before Levy, Acting P.J., Detjen, J. and Meehan, J.

INTRODUCTION

The two victims in this case were sitting in their car at a park one night waiting for friends to arrive. One of the victims noticed a car pass by twice and then two individuals, described as Hispanic men by the victims, approached, armed with guns. The victims were ordered out of their car and searched. The two individuals then drove off in the victims' car, followed by the car that had passed by twice. The stolen car was subsequently spotted by law enforcement and a pursuit ensued. Appellant J.A., who was then 14 years old and driving the stolen car, crashed into an orchard, at which time he and his two companions, ages 15 and 18 years old, were arrested.

J.A. was charged in a juvenile wardship petition with carjacking (Pen. Code, § 215, subd. (a) (count 1)),¹ two counts of second degree robbery (§ 212.5, subd. (c) (counts 2 & 3)), carrying a loaded firearm while an active participant in a criminal street gang (§ 25850, subd. (c)(3) (count 4)), possession of a firearm capable of being concealed by a minor (§ 29610 (count 5)), and active participation in a criminal street gang (§ 186.22, subd. (a) (count 6)). (Welf. & Inst. Code, § 602, subd. (a).) As to counts 1 through 3, the petition alleged firearm enhancements under section 12022.53, subdivisions (b) and (e)(1); and as to counts 1 through 3 and 5, the petition alleged a gang enhancement under section 186.22, subdivision (b)(1).

At a subsequent status hearing on the People's motion to transfer J.A. from juvenile court to a court of criminal jurisdiction, brought pursuant to Welfare and Institutions Code section 707, former subdivision (a)(1),² the People withdrew their transfer motion and, in accordance with a negotiated plea bargain, J.A. admitted to

¹ All further statutory references are to the Penal Code unless otherwise specified.

² Pursuant to the amendment of Welfare and Institutions Code section 707 effective January 1, 2019, the district attorney no longer has the authority to make a transfer motion in cases involving a 14- or 15-year-old individual, unless the individual was not apprehended prior to the end of juvenile court jurisdiction. (Stats. 2018, ch. 1012, § 1.)

carjacking (count 1). The People dismissed the remaining five counts and all enhancement allegations, including those attached to count 1. J.A. waived time and the juvenile court determined that his maximum term of confinement was nine years less 268 days credit for time served, adjudged him a ward of the juvenile court, granted him probation not to exceed his 21st birthday, removed him from his mother's custody and committed him to Kern Crossroads Facility. In relevant part, the court found, over J.A.'s objection, that the carjacking offense was gang related pursuant to section 186.30, subdivision (b)(3), and ordered him to comply with the gang registration requirement under 186.30, subdivision (a). The court also ordered that J.A. "shall not be involved in any criminal street gang."

On appeal, J.A. claims the juvenile court's finding that his crime was gang related under section 186.30, subdivision (b)(3), is not supported by substantial evidence. He also claims the probation condition prohibiting him from being involved in a criminal street gang is unconstitutionally vague as to criminal street gang and must be modified. The People dispute J.A.'s entitlement to relief on the first claim, but they concede the second claim and do not oppose his proposed modification incorporating the definition of "criminal street gang" within the meaning of section 186.22, subdivisions (e) and (f).

For the reasons explained, *post*, we strike the gang registration requirement as unsupported by substantial evidence that the carjacking was gang related, and we modify J.A.'s conditions of probation to incorporate the definition of criminal street gang set forth in subdivisions (e) and (f) of section 186.22. The judgment is otherwise affirmed.

DISCUSSION

I. Finding of Gang Relatedness Not Supported by Substantial Evidence

A. Background

"In 1988, the Legislature enacted the California Street Terrorism Enforcement and Prevention Act (the STEP Act). (§ 186.20 et seq.)" (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1047.) "Underlying the STEP Act was the Legislature's recognition that

“California is in a state of crisis which has been caused by violent street gangs whose members threaten, terrorize, and commit a multitude of crimes against the peaceful citizens of their neighborhoods.” (Pen. Code, § 186.21.) The act’s express purpose was “to seek the eradication of criminal activity by street gangs.” [Citation.]’ [Citation.] In pursuit of this goal, the STEP Act focuses upon ‘patterns of criminal gang activity and upon the organized nature of street gangs, which together, are the chief source of terror created by street gangs.’ (§ 186.21.)” (*People v. Rodriguez* (2012) 55 Cal.4th 1125, 1129, fn. omitted.)

In 2000, Proposition 21 amended the STEP Act, adding, relevant to this appeal, section 186.30 to the Penal Code. (*In re Jorge G.* (2004) 117 Cal.App.4th 931, 938 (*Jorge G.*)). Section 186.30 provides for a gang registration requirement that applies (1) to persons who either were convicted in a criminal court or had a petition sustained in juvenile court (2) where the case involves a substantive gang offense under section 186.22, subdivision (a); a gang enhancement under section 186.22, subdivision (b); *or* a finding by the court at the sentencing or disposition hearing that the offense was gang related. (§ 186.30.)

The statute provides in full:

“(a) Any person described in subdivision (b) shall register with the chief of police of the city in which he or she resides, or the sheriff of the county if he or she resides in an unincorporated area, within 10 days of release from custody or within 10 days of his or her arrival in any city, county, or city and county to reside there, whichever occurs first.

“(b) Subdivision (a) shall apply to any person convicted in a criminal court or who has had a petition sustained in a juvenile court in this state for any of the following offenses:

“(1) Subdivision (a) of Section 186.22.

“(2) Any crime where the enhancement specified in subdivision (b) of Section 186.22 is found to be true.

“(3) Any crime that the court finds is gang related at the time of sentencing or disposition.” (§ 186.30.)

The juvenile court in this case made a summary finding pursuant to subdivision (b)(3) of section 186.30 that the carjacking offense was gang related and imposed the gang registration requirement. J.A. objected on the ground that the gang enhancement allegation had been dismissed and the case was not gang related.

The court responded, “That was a finding that I made, which would be consistent with [section] 186.30[, subdivision](b)(3) [¶] Now, do I need more than simply the recommendation of the ... [probation] report? I don’t know that I do, but ... how do you propose to deal with this, if you—I guess the issue would be to bring the matter before—back before the Court and/or to appeal and/or, I suppose, a writ challenging that finding. I mean, probably the best thing to do would be to bring it back to the Court [and challenge the section 186.30, subdivision (b)(3) finding].” J.A. now appeals.

B. Analysis

The general legal principles framing our review have long been established. ““When an appellant asserts there is insufficient evidence to support the judgment, our review is circumscribed. [Citation.] We review the whole record most favorably to the judgment to determine whether there is substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could have made the requisite finding under the governing standard of proof.”” (*Jorge G.*, *supra*, 117 Cal.App.4th at pp. 941–942, quoting *In re Jerry M.* (1997) 59 Cal.App.4th 289, 298.)

“[T]he fact that the subject crime was gang related need be proved only by a preponderance of the evidence.” (*Jorge G.*, *supra*, 117 Cal.App.4th at p. 944.) However, the “finding is supported by sufficient evidence only if there is evidence that is reasonable, credible, and of solid value supporting each element of gang relatedness. A crime is gang related if it is related to a criminal street gang as defined in section 186.22, subdivisions (e) and (f). The elements of this definition require: (1) an ongoing

organization or group, (2) of three or more persons, (3) having as one of its primary activities the commission of the crimes enumerated in section 186.22, subdivision (e)(1)–(25), (4) having a common name or symbol, and (5) whose members individually or collectively have engaged in a pattern of criminal gang activity. This pattern of gang activity must consist of: (a) two or more of the offenses enumerated in section 186.22, subdivision (e)(1)–(25), provided that at least one offense occurred after the effective date of the statute; (b) the last offense occurred within three years of the one before it; and (c) the offenses were committed on separate occasions or by two or more persons.” (*Ibid.*; accord, *In re J.V.* (2010) 181 Cal.App.4th 909, 912; *People v. Martinez* (2004) 116 Cal.App.4th 753, 761–762.)

In this case, the juvenile court’s finding of gang relatedness was expressly based on the fitness report prepared by the probation department. (Welf. & Inst. Code, § 707, subd. (a).) The facts relevant to the court’s finding are limited. At the time of the crime and their subsequent arrest, J.A.’s 18-year-old companion was wearing dark gray clothing and a red bandana, he admitted belonging to the “Richgrove Norteño” gang, and he had a Norteño tattoo on his wrist. He also admitted one of the firearms—the rifle—belonged to him, along with some ammunition. J.A. denied he was affiliated with a gang, but he stated that his companions were affiliated with “Northerners” and several neighborhood friends he grew up with now “bang[ed],” although he did not. The probation report also documented three gang related incidents involving J.A. at school: he was found in possession of a red bandana, he told school officials he was affiliated with the “Northerners” and he was involved in an unspecified violation of school rules.

Citing *People v. Martinez*, *supra*, 116 Cal.App.4th at page 762, the People argue that “the juvenile court could reasonably have determined that, notwithstanding [J.A.’s] denial that he was ‘gang affiliated,’ his participation in the carjacking of [the victim’s] automobile along with ... an admitted member of a criminal street gang[] was done ‘for the benefit of, at the direction of, or in association with a criminal street gang.’” While

carjacking is one of the offenses that qualifies as “criminal gang activity” under section 186.22, subdivision (e)(21), the People’s argument overlooks the absence of *any* evidence that the carjacking was in fact tied to a “criminal street gang” as defined in subdivisions (e) and (f) of section 186.22. That is, evidence of “(1) an ongoing organization or group, (2) of three or more persons, (3) having as one of its primary activities the commission of the crimes enumerated in section 186.22, subdivision (e)(1)–(25), (4) having a common name or symbol, and (5) whose members individually or collectively have engaged in a pattern of criminal gang activity” consisting of “(a) two or more of the offenses enumerated in section 186.22, subdivision (e)(1)–(25), provided that at least one offense occurred after the effective date of the statute; (b) the last offense occurred within three years of the one before it; and (c) the offenses were committed on separate occasions or by two or more persons.” (*Jorge G.*, *supra*, 117 Cal.App.4th at p. 944.)

In addition, notwithstanding the People’s contrary representation, their argument also overlooks the absence of *any* evidence that the carjacking benefitted a criminal street gang, was committed at the direction of a criminal street gang, or was committed in association with a criminal street gang. (*People v. Martinez*, *supra*, 116 Cal.App.4th at p. 762; see *People v. Ochoa* (2009) 179 Cal.App.4th 650, 663 [“[t]he gang enhancement cannot be sustained based solely on [the] defendant’s status as a member of the gang and his subsequent commission of crimes”]; *In re Frank S.* (2006) 141 Cal.App.4th 1192, 1199 [“[the minor’s] criminal history and gang affiliations cannot solely support a finding that a crime is gang-related under section 186.22”].) The mere fact that J.A. committed a carjacking while in the company of an admitted gang member falls well short of supporting the juvenile court’s finding that the crime was gang related within the meaning of section 186.22. (*People v. Martinez*, *supra*, at p. 761.) Although the People point out that the issue is whether the carjacking was gang related and not whether there was sufficient evidence that J.A. violated section 186.22, this argument ignores the fact

that the issue of gang relatedness under section 186.30, subdivision (b)(3), draws on section 186.22 for definition. (*In re J.V.*, *supra*, 181 Cal.App.4th at p. 912; *Jorge G.*, *supra*, 117 Cal.App.4th at p. 944; *People v. Martinez*, *supra*, at pp. 761–762.)

Given that the juvenile court’s finding of gang relatedness under section 186.30, subdivision (b)(3), is not supported by substantial evidence, the gang registration requirement under subdivision (a) of the statute shall be stricken.

II. Modification of Probation Condition to Incorporate Statutory Definition of Criminal Street Gang

“The juvenile court has wide discretion to select appropriate conditions and may impose “any reasonable condition that is ‘fitting and proper to the end that justice may be done and the reformation and rehabilitation of the ward enhanced.’”” (*In re Sheena K.* (2007) 40 Cal.4th 875, 889.) “A probation condition ‘must be sufficiently precise for the probationer to know what is required of him, and for the court to determine whether the condition has been violated,’ if it is to withstand a challenge on the ground of vagueness. [Citation.] A probation condition that imposes limitations on a person’s constitutional rights must closely tailor those limitations to the purpose of the condition to avoid being invalidated as unconstitutionally overbroad.” (*Id.* at p. 890.) “[T]he underpinning of a vagueness challenge is the due process concept of ‘fair warning.’ [Citation.] The rule of fair warning consists of ‘the due process concepts of preventing arbitrary law enforcement and providing adequate notice to potential offenders’ [citation], protections that are ‘embodied in the due process clauses of the federal and California Constitutions. (U.S. Const., Amends. V, XIV; Cal. Const., art. I, § 7).” (*Ibid.*)

J.A. argues that the probation condition requiring that he “not be involved in any criminal street gang” is constitutionally vague as to “criminal street gang,” and he proposes that it be modified to incorporate the statutory definition set forth in subdivisions (e) and (f) of section 186.22. (*People v. Lopez* (1998) 66 Cal.App.4th 615,

634; accord, *In re Vincent G.* (2008) 162 Cal.App.4th 238, 246 & fn. 4.) The People agree on the first point and express nonopposition to J.A.'s proposed modification.

We accept the People's concessions. In *People v. Lopez*, this court held that the term "gang," by itself, was too unconstitutionally vague to give a defendant proper notice of those he or she cannot associate with. (*People v. Lopez, supra*, 66 Cal.App.4th at pp. 630–634.) We concluded that the proper remedy was to order the modification of the gang association condition by including reference to gangs as defined by section 186.22, subdivisions (e) and (f). (*People v. Lopez, supra*, at p. 634; accord, *In re Vincent G., supra*, 162 Cal.App.4th at p. 246 & fn. 4.) We shall do so here.

DISPOSITION

The gang registration requirement imposed by the juvenile court pursuant to section 186.30 is stricken as unsupported by substantial evidence that the carjacking offense was gang related. Additionally, the condition of probation prohibiting J.A. from being involved in any criminal street gang is modified as follows: You shall not be involved in any criminal street gang, as defined by section 186.22, subdivisions (e) and (f), or any graffiti tagging crew, and you shall not knowingly associate with any person known to you to be in a criminal street gang, as defined by section 186.22, subdivisions (e) and (f), or in a tagging crew.

The juvenile court shall amend its records accordingly and transmit a copy to the appropriate authorities. As so modified, the judgment is affirmed.